

The employer and its insurance carrier contend Judge Sample erred. They argue claimant should be denied a work disability (a permanent partial general disability greater than the functional impairment rating) as claimant allegedly refused to perform work that

the employer had available. Accordingly, the employer and its insurance carrier request the Board to reduce claimant's permanent partial general disability to five percent.

Conversely, claimant requests the Board to affirm the Award. Claimant also argues that if the permanent partial general disability is modified, it should be increased.

The only issue before the Board on this appeal is the nature and extent of disability. But before deciding that issue, the Board must also determine if claimant refused to perform accommodated work that the employer allegedly offered to claimant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

For the reasons below, the Award should be affirmed.

Claimant injured her back on June 22, 1999, when she fell while unloading a truck at her employer's restaurant. Following the injury, claimant returned to work for the employer and in March 2000 received work restrictions limiting her lifting, bending, squatting, kneeling and stooping.

The employer attempted to accommodate claimant's restrictions and her difficulties bending and lifting by moving her from a line cook to a somewhat physically easier job as a prep person, where she mixed batters and prepared vegetables and other food items. Although the prep job was easier, claimant had difficulty performing those duties and often needed help from her husband, who also worked at the restaurant.

The restaurant was having financial problems. According to the wage records introduced into the record, in May 2000 the employer began reducing claimant's hours. For the last six weeks that claimant worked for the employer, claimant worked 22.33, 12.98 and 9.39 hours for each respective two-week period. Claimant was then dropped from the work schedule. Claimant last worked for the employer on approximately June 19 or 20, 2000.

Although it is hotly contested, the Board finds claimant's store manager, Barbara King, suggested that claimant contact two or three of the employer's other area restaurants. Claimant contacted one of the restaurants, which was located in Olathe, Kansas, and was advised that it did not have any position for her other than cooking, which would violate her work restrictions. Claimant did not contact one of the other restaurants, which was located on State Avenue, as she understood they were also seeking cooks, which she should not do. In May 2001, claimant applied at two of the employer's other area restaurants but never received any response.

The employer and its insurance carrier argue that claimant refused to perform work that the employer had made available to claimant. The Judge rejected that argument and the Board concurs. The Board finds that the employer began reducing claimant's hours and eventually stopped scheduling her to work. Accordingly, claimant lost the accommodated work that she was performing for the employer. Conversely, the record fails to establish that the employer then offered claimant other accommodated work at any of its other restaurants. At most, the record establishes that claimant's former store manager merely suggested that claimant should contact some of the employer's other area restaurants, which she did. In short, claimant was left to her own devices in finding appropriate work within her permanent work restrictions.

The Board finds and concludes the record fails to establish that the employer offered claimant accommodated work or that claimant refused to work for the employer. Accordingly, the Board rejects the employer and its insurance carrier's argument that claimant's permanent partial general disability should be reduced to the functional impairment rating.

According to the medical report of Dr. Vito J. Carabetta, whom the Judge selected to perform an independent medical evaluation, claimant has sustained a five percent whole body functional impairment and should observe permanent work restrictions that would limit her lifting to 20 to 25 pounds on an occasional basis and frequent lifting to 10 to 13 pounds. The doctor also believes claimant should bend and stoop only occasionally and that she should pursue activities that permit her to frequently alter her position.

The Judge determined claimant has lost the ability to perform 61 percent of the tasks that she performed in the 15-year period before the June 22, 1999 accident. The Judge also determined that claimant sustained a 37 percent wage loss due to that accident. The Board adopts those findings and the Judge's analysis that lead to those conclusions.

AWARD

WHEREFORE, the Board affirms the April 15, 2002 Award entered by Judge Sample.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Julie A. N. Sample, Administrative Law Judge
Director, Division of Workers Compensation